

1
2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 JUNE ELIZABETH BROGDON,

7 Plaintiff,

8 v.

9 WASHINGTON STATE
10 DEPARTMENT OF CHILDREN,
11 YOUTH AND FAMILY,

12 Defendant.

CASE NO. 3:23-cv-05832-BHS

ORDER

13 THIS MATTER is before the Court on defendant Washington State Department of
14 Children Youth and Family (DCYF)'s motion to dismiss pro se plaintiff June Brogdon's
15 complaint against it. Dkt. 24.

16 This is the third case Brogdon has filed against the DCYF, claiming it unlawfully
17 removed her children in 2012. The first was *Brogdan*¹ v. *Washington*, No. C16-6017
18 RBL. Judge Leighton of this District denied Brogdon's application to proceed *in forma*
19 *pauperis*, concluding that her claims were time barred as a matter of law, and that the
20 *Rooker Feldman* doctrine barred her efforts to have a federal court review and reverse
21 state court decisions regarding the removal of her children. *See* Dkt. 15 in that first case.
22 Brogdon did not pay the filing fee, and the case was dismissed. Dkt. 16.

¹ The alternate spelling is plaintiff's, in her earliest case.

1 Brogdon sued again in 2019. *Brogdon v. State of Washington Children's*
2 *Administration, et al.*, No. C19-5332 BHS. This Court dismissed that case because
3 Brogdon had failed to name a person as a defendant, and her 42 U.S.C. § 1983 claim was
4 not plausible. It also concluded that the claims were facially time-barred. It dismissed the
5 case. *See* Dkt. 9 in the 2019 case.

6 Like her prior attempts, Brogdon's complaint in this case² is difficult to follow.
7 She appears to contend that the DCYF illegally removed her children from her home in
8 May 2012. She asserts that the removal violated the Indian Child Welfare Act (ICWA),
9 25 U.S.C. § 1914. She asks the Court to return her children to her, to reverse any
10 adoptions, and to award her \$30,000,000. Dkt. 17 at 5.

11 DCYF seeks dismissal under Federal Rules of Civil Procedure 12(b)(1) and (6).
12 Dkt. 24. It argues that Brogdon has not plausibly alleged that she is the parent of an
13 Indian child, and that the Court lacks subject matter jurisdiction under the ICWA. It also
14 contends that because one of the children is no longer a minor, her claim regarding that
15 person is moot. Dkt. 24 at 3. It argues that DCYF is a state agency and that it has not
16 waived its Eleventh Amendment sovereign immunity. *Id.* at 6. It asserts that Brogdon's
17 42 U.S.C. § 1983 claim fails for the same reason; the state is not a "person" under that
18

19 ² Brogdon's initial complaint, Dkt. 1-1, was filed as her operative complaint, Dkt. 17,
20 after Magistrate Judge Theresa Fricke granted Brogdon's application to proceed *in forma*
21 *pauperis*. Dkt. 16. As the State correctly points out, Brogdon's subsequent amended complaints,
22 Dkts. 19, 22, are improper and ineffective because they were filed without its consent or leave of
court. Dkt. 23 (citing Federal Rule of Civil Procedure 15(a)(1)(A)). This order addresses the
operative complaint, Dkt. 17, but the result would be no different if the Court addressed the later
versions.

1 statute. *Id.* at 8. DCYF also points out that Brogdon’s ICWA (and § 1983) claims are
2 facially barred by the applicable two- or three-year limitations period. The acts of which
3 she complains occurred more than a decade before she filed this suit. *Id.* at 12–14 (citing
4 *In re Adoption of Erin G.*, 140 P.3d 886, 893 (Alaska 2006) (Federal courts “borrow”
5 state limitations periods for claims similar to ICWA claims)).

6 Brogdon has filed three documents that the Court will construe together as a
7 response to DCYF’s motion. Dkts. 25, 26, 27. She does not directly address any of
8 DCYF’s arguments, other than to reiterate that the ICWA does not include its own
9 limitations period, Dkt. 25 at 1, 5, and to assert without explanation that she is “Native
10 American.” *Id.* Instead, as she did in the prior cases, she complains that DCYF attorneys
11 Kimberly Witherspoon, Kevin Storm, Kaelen Brodie, and Jeffery Asprocolas “lied” in
12 the underlying state court proceeding that led to the removal of her children. She
13 concedes that these events occurred 12 years ago.

14 Under Fed. R. Civ. P. 12(b)(1), a court must dismiss for lack of subject matter
15 jurisdiction if, construing the factual allegations in the light most favorable to the
16 plaintiff, the action: (1) does not arise under the Constitution, laws, or treaties of the
17 United States, or does not fall within one of the other enumerated categories of Article
18 III, Section 2, of the Constitution; (2) is not a case or controversy within the meaning of
19 the Constitution; or (3) is not one described by any jurisdictional statute. *United Transp.*
20 *Union v. Burlington N. Santa Fe R. Co.*, No. C06-5441 RBL, 2007 WL 26761, at *2
21 (W.D. Wash. Jan. 2, 2007), *aff’d*, 528 F.3d 674 (9th Cir. 2008). The plaintiff bears the
22

1 | burden of proving the existence of subject matter jurisdiction. *Stock West, Inc. v.*
2 | *Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

3 | A motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1)
4 | may be either “facial” or “factual.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039
5 | (9th Cir. 2004). In a facial attack on the court’s subject-matter jurisdiction, the court
6 | resolves the motion as it would a motion to dismiss under Rule 12(b)(6). *Leite v. Crane*
7 | *Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014); *Savage v. Glendale Union High Sch.*, 343 F.3d
8 | 1036, 1039 n.1 (9th Cir. 2003). The court must determine “whether the allegations are
9 | sufficient as a legal matter to invoke the court’s jurisdiction.” *Leite*, 749 F.3d at 1121. If
10 | the court “determines at any time that it lacks subject-matter jurisdiction, the court must
11 | dismiss the action.” Fed. R. Civ. P. 12(h)(3).

12 | When the Rule 12(b)(1) jurisdictional attack is factual, the district court can
13 | generally resolve factual disputes. It should refrain from doing so, however, where the
14 | jurisdictional issue and the substantive merits of the case are “inextricably intertwined.”
15 | *See Kingman Reef Atoll Investments, L.L.C. v. United States*, 541 F.3d 1189, 1196-97
16 | (9th Cir. 2008).

17 | Dismissal under Federal Rule of Civil Procedure 12(b)(6) may be based on either
18 | the lack of a cognizable legal theory or the absence of sufficient facts alleged under a
19 | cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
20 | 1988). A plaintiff’s complaint must allege facts to state a claim for relief that is plausible
21 | on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim has “facial plausibility”
22 | when the party seeking relief “pleads factual content that allows the court to draw the

1 reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* Although
2 courts must accept as true the complaint’s well-pled facts, conclusory allegations of law
3 and unwarranted inferences will not defeat an otherwise proper Rule 12(b)(6) motion to
4 dismiss. *Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007); *Sprewell v.*
5 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “[A] plaintiff’s obligation to
6 provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and
7 conclusions, and a formulaic recitation of the elements of a cause of action will not do.
8 Factual allegations must be enough to raise a right to relief above the speculative level.”
9 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). This requires a
10 plaintiff to plead “more than an unadorned, the-defendant-unlawfully-harmed-me
11 accusation.” *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555).

12 Against these standards, the Court must again dismiss Brogdon’s complaint. First,
13 Brogdon’s claims arising out of the 2012 state court action to remove her children are
14 facially time-barred. If and to the extent she asks this Court to reverse, modify, or undo
15 whatever the state court decided in 2012, her claims fail as a matter of law. The *Rooker-*
16 *Feldman* doctrine precludes “cases brought by state-court losers complaining of injuries
17 caused by state-court judgments . . . and inviting district court review and rejection of
18 those judgments.” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284
19 (2005). “[W]hen a losing plaintiff in state court brings a suit in federal district court
20 asserting as legal wrongs the allegedly erroneous legal rulings of the state court and seeks
21 to vacate or set aside the judgment of that court, the federal suit is a forbidden de facto
22

1 appeal.” *Noel v. Hall*, 341 F.3d 1148, 1156 (9th Cir. 2003); *accord Carmona v. Carmona*,
 2 603 F.3d 1041, 1050 (9th Cir. 2008).

3 Brogdon’s conclusory claims that she is “a Native American,” and that her
 4 children “qualify to be members in the Paiute tribe” are not enough to establish standing
 5 to assert an ICWA claim. DCYF argues, persuasively, that the Court does not have
 6 subject matter jurisdiction over the case:

7 The ICWA applies to a child custody proceeding, including a termination
 8 of parental rights action, where the action concerns an “Indian child.” *See*
 9 25 U.S.C. § 1912; 25 C.F.R. § 23.103(a). ICWA defines an “Indian child”
 10 as “any unmarried person who is **under age eighteen** and is either (a) **a**
member of an Indian tribe or (b) **is eligible for membership** in an Indian
 tribe **and** is the **biological child of a member** of an Indian tribe.” 25
 U.S.C. § 1903(4).

11 To state a claim under § 1914, a plaintiff must allege adequate facts
 12 demonstrating that the child at issue is an Indian child. *Esquivel v. Fresno*
 13 *Cnty. Dep’t of Soc. Servs.*, No. 22-16975, 2023 WL 8014223, at *1-2 (9th
 14 Cir. Nov. 20, 2023) (unpublished opinion). A complaint is insufficient in
 15 this regard if it merely alleges facts that suggest there is reason to know a
 16 child may be an Indian child. *Hawkings v. Sacramento Cnty. Dep’t of Child*
 17 *& Family Adult Servs.*, No. 2:20-cv-0156 DAD DB PS, 2023 WL 316569,
 at *3 (Slip Opinion) (E.D. Cal. Jan. 19, 2023), report and recommendation
 adopted, No. 2:20-cv-0156 KJM DB PS, 2023 WL 5956845 (Slip Opinion)
 (E.D. Cal. Sept. 13, 2023). Where a plaintiff fails to allege facts that, if true,
 would establish that the child at issue is an Indian child, the plaintiff lacks
 statutory standing under § 1914.

18 Dkt. 24 at 9 (bolded emphasis added). DCYF argues that Brogdon has not pled that
 19 she is a member of a tribe, or that her children are. It asks the Court to dismiss under
 20 claim under Rule 12(b)(1).

21 The Court agrees that Brogdon has not invoked this Court’s subject matter
 22 jurisdiction. Her claims are not otherwise plausible, and DCYF’s motion to dismiss under

1 Rules 12(b)(1) and (6) is **GRANTED**. The case is **DISMISSED**, without prejudice and
2 without leave to amend.

3 The Clerk shall enter a **JUDGMENT** and close the case.

4 Dated this 3rd day of April, 2024.

5
6 

7 BENJAMIN H. SETTLE
United States District Judge
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22